Tan Ah Theam & Ors v Ong Han Meng

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO P-02-226 OF 1996
NH CHAN, ABDUL MALEK AHMAD AND MOKHTAR SIDIN JJCA
19 JANUARY 1998

Contract *— Repudiation — Refusal to execute building plans — Refusal was unreasonable — Whether plaintiff can lawfully rescinded agreement — Whether appellate court should interfere with findings of court below*

The plaintiff entered into a sale and purchase agreement whereby the plaintiff agreed to purchase and the defendants agreed to sell a piece of land. The agreement provided that the plaintiff was to submit layout and building plans for the construction of shop houses on the land and the defendants were to sign all plans and applications pertaining to the development of the land. The building plans submitted by the plaintiff was rejected by the relevant authority on the ground that they had used the imperial sysytem instead of the metric system. Another set of building plans were subsequently prepared and were signed by PW2 for and on behalf of the defendants. The defendants alleged that the plaintiff had submitted the building plans despite not being signed by them and claimed that there was a forgery. The plaintiff then requested the defendants to re-sign the amended building plan which the defendants refused to do so. Since the defendants had evinced an intention to be no longer bound by the agreement, the plaintiff took it as repudiation on the defendants' part, which he accepted. The plaintiff claimed for a declaration that the agreement had been wrongfully repudiated by the defendants and claimed a refund of the deposit paid and damages for breach of contract. The issue before the court was whether the defendants had sufficient cause to refuse the execution of the building plans and whether the plaintiff, in the face of the defendants' refusal to re-sign the building plans, had lawfully rescinded the agreement. The trial judge found that there was no difference between the imperial plan and metric plan and it did not give to the plaintiff an advantage that the defendants had not bargained for in the imperial plan. There being no advantage to the plaintiff, then it was most unreasonable of the defendants to refuse execution of the fresh metric plan. The defendants' assertion that the plaintiff had not given them an explanation and that they were denied of their right to the execution of the building plan was not supported by the facts. Rather the trial judge found that it was more probable that the defendants were engineering a way out of the agreement. The defendants appealed.

Held, dismissing the appeal:

The court had evaluated the evidence presented at the trial, carefully considered the arguments of both parties and the authorities stated by them. As an appellate tribunal, the court would be reluctant to

interfere with the findings of fact of the court below. The court totally agreed with the reasoning and conclusion of the trial judge (see p 199B–C).

[Bahasa Malaysia summary

Plaintif telah memasuki satu perjanjian jualbeli di mana plaintif telah bersetuju untuk membeli dan defendan-defendan bersetuju untuk menjual sebidang tanah. Perjanjian tersebut memperuntukan bahawa plaintif hendaklah mengemukakan pelan-pelan bangunan dan susun-atur untuk pembinaan rumah-rumah kedai di atas tanah itu dan defendan-defendan hendaklah menandatangani semua pelan dan permohonan-permohonan berhubung dengan pembangunan tanah tersebut. Pelan bangunan yang dikemukakan oleh plaintif telah ditolak oleh pihak berkuasa yang relevan atas alasan bahawa mereka telah menggunakan sistem imperial dan bukannya sistem metrik. Satu lagi set pelan-pelan bangunan telah kemudiannya disediakan dan ditandatangani oleh PW2 untuk dan bagi pihak defendan-defendan. Defendan-defendan mendakwa bahawa plaintif telah mengemukakan pelan-pelan bangunan tersebut meskipun tidak ditandatangani oleh mereka dan menuntut bahawa terdapatnya pemalsuan. Plaintif kemudiannya meminta defendan-defendan menandatangani semula pelan bangunan yang telah dipinda yang mana enggan dilakukan oleh defendan-defendan. Oleh kerana defendan-defendan telah menunjukkan satu niat untuk tidak lagi terikat oleh perjanjian tersebut, plaintif telah menyifatkannya sebagai satu penolakan oleh defendan-defendan, yang mana telah diterima oleh beliau. Plaintif menuntut satu pengisytiharan bahawa perjanjian tersebut telah ditolak secara salah oleh defendan-defendan dan menuntut pembayaran balik deposit yang telah dibayar dan gantirugi kerana kemungkiran kontrak. Isu yang di hadapan mahkamah adalah sama ada defendan-defendan mempunyai kausa yang mencukupi untuk menolak penyempurnaan pelan-pelan bangunan dan sama ada plaintif, kerana keengganan defendan-defendan untuk menanda-tangani semula pelan-pelan bangunan tersebut, telah secara sah di sisi undang-undang menamatkan perjanjian tersebut. Hakim perbicaraan mendapati bahawa tiada perbezaan antara pelan imperial dan pelan metrik dan tidak memberikan plaintif suatu kelebihan yang defendan-defendan tidak bersedia serta sanggup terima dalam pelan imperial itu. Oleh kerana tiada kelebihan bagi plaintif, maka adalah amat tidak berpatutan bagi defendan-defendan untuk enggan menyempurnakan pelan metrik yang baru itu. Penegasan defendan-defendan bahawa plaintif telah tidak memberikan penjelasan kepada mereka dan bahawa mereka telah dinafikan hak untuk menyempurnakan pelan bangunan itu tidak disokong oleh fakta-fakta. Sebaliknya hakim perbicaraan mendapati bahawa adalah lebih berkemungkinan defendan-defendan sedang mencari jalan untuk keluar daripada perjanjian tersebut. Defendan-defendan telah merayu.

A **Diputuskan,** menolak rayuan tersebut:

Mahkamah telah menilaikan keterangan yang dikemukakan di perbicaraan, mempertimbangkan dengan teliti hujahan-hujahan kedua-dua pihak dan autoriti-autoriti yang dinyatakan oleh mereka. Sebagai sebuah tribunal rayuan, mahkamah akan enggan untuk
B mencampuri keputusan fakta mahkamah di bawah. Mahkamah sesungguhnya bersetuju dengan alasan dan keputusan hakim perbicaraan (lihat ms 199B–C).]

Notes

C For cases on repudiation generally, see 3 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 2735–2742.

Legislation referred to

D Contracts Act 1950 s 74

Appeal from: Civil Suit No 22–13 of 1998 (High Court, Pulau Pinang)

David Morais (*Karen Yeoh Su-Lin* with him) (*David Morais*) for the appellants.

E *Mahinder Singh Dulku* (*Mahinder Singh Dulku & Co*) for the respondent.

Abdul Malek Ahmad FCJ (delivering the judgment of the court): According to the statement of claim of the respondent, who was the plaintiff in the court below, by a sales and purchase agreement dated 21 January 1986 between him as purchaser and the six defendants, who are
F the appellants before us, as vendor, the respondent had agreed to purchase a portion of Lot 391, Section A, Town of Jelutong, Penang with the premises No 260 Jalan Jelutong at a price of RM210,000 subject to the terms and conditions contained in the agreement.

Clause 4 of the agreement states that the respondent is entitled to
G submit layout and building plans for the construction of three units of four storeyed shophouses on the land, and the appellants shall sign all plans and applications pertaining to the development of the said land.

Clause 9 of the agreement provides that if the respondent's application in cl 4 is not approved within thirty months from the date of the agreement, then the appellants are entitled to rescind the agreement whereupon they
H are to refund the RM15,000 deposited by the respondent.

Accordingly, the respondent had submitted a layout plan and the building plans to the Majlis Perbandaran Pulau Pinang ('the MPPP') signed by all the appellants. The layout plan was approved on 25 May 1987. However, the building plans were rejected on the grounds that they had
I used the imperial system instead of the metric system.

Another set of building plans were subsequently prepared and a temporary staff member of the firm of chartered architects responsible

('PW2') signed them for and on behalf of the appellants on the instructions of the third appellant. The said plans were submitted to the MPPP on 2 July 1987. A

Through their solicitors, the appellants wrote a letter on 11 August 1987 to the MPPP alleging that the respondent had submitted the building plans despite not being signed by them and accordingly, they requested the MPPP not to consider them for approval as they intended to institute proceedings against the parties responsible for the alleged fraudulent deception. B

It was the respondent's averment that the appellants have not suffered or will not suffer any loss whatsoever as a result of this as the building plans not signed by them was the same in all material aspects with the earlier ones signed by them except for the metric system replacing the imperial system. In any case, the respondent's solicitors wrote to the appellants' solicitors on 20 August 1987 requesting them to re-sign the amended building plans. C

By letter dated 25 August 1987, the appellants refused to do so. The respondent repeated his request on 7 January 1988 and again the appellants refused. Since the appellants had evinced an intention to be no longer bound by the agreement, the respondent took it as a repudiation on the appellants' part. Thus the respondent accepted the repudiation without prejudice to his legal rights to claim damages for breach of contract. D

The particulars of the respondent's loss and damage was that he was not able to develop the said land in accordance with the approval layout plan and the proposed building plans within the times stipulated in the said agreement. The estimated loss of profits was In the region of RM617,000. E

His claim, therefore, was for a declaration that the agreement had been wrongfully repudiated by the appellants, a refund of RM15,000 paid together with interest, damages for breach of contract amounting to RM617,000, interest, costs and other relief. F

Before us, learned counsel for the appellants argued that when the appellants refused to re-sign the building plans for approval, the respondent treated it as a repudiation which they accept. However, it was the appellants' contention that it was the respondent who had repudiated first by the fact of the forgery. Further, the learned judge at first instance did not make any finding that it was the appellants who had terminated the contract and in fact, they had not sent any specific letter of termination. It was also the view of learned counsel for the appellants that the respondent was only entitled to the return of the deposit and was not entitled to damages for loss of profit as he had not sued for specific performance. G H

It was evidently clear, according to learned counsel for the respondent, from their letters dated 20 August 1987 and 7 January 1988, that his client had wanted the contract to continue and that the second set of building plans submitted for approval which was signed by PW2 were done without his knowledge and approval as a result of which they had prepared the building plans again for the appellants to re-sign. It has been stated in the second letter that should the appellants refuse to resign, it would be regarded as a repudiation on their part. I

A Reference was made to s 74 of the Contracts Act 1950 which provides that when a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damages caused to him thereby, which naturally arise in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the B breach of it.

Learned counsel further reiterated that the respondent had paid for the layout plan, the court was not in a position to order the appellants to resign the building plans, specific performance was not possible and the prayer for damages was abandoned at the trial as the parties had agreed that damages C were to be assessed by the senior assistant registrar.

In their counterclaim, the appellants had asked for a declaration that the said agreement had been wrongfully repudiated by the respondent, a declaration that the sum of RM15,000 had been lawfully forfeited by the appellants, for RM2,250,000 for loss of profits, general damages, interest and costs.

D

Before the learned high court judge, both parties agreed that the only issue was whether the appellants had sufficient cause to refuse the execution of the building plans and whether the respondent, in the face of the appellants' refusal to re-sign the building plans, had lawfully rescinded the said agreement. Regarding the damages, they had agreed that if liability was E found against the appellants, they were to be assessed by the learned senior assistant registrar.

Having evaluated the facts presented at the trial, the learned trial judge recapitulated the evidence as follows:

(a) the respondent and his witnesses denied that the respondent F instructed PW2, who signed on behalf of the appellants for the second set of building plans submitted for approval, to copy the appellants' signatures;

(b) both PW2 and PW3 testified that the third appellant authorized PW2 to sign on behalf of the appellants;

G (c) the third appellant had conceded that he had never alleged that the respondent forged the appellants' signatures or was instrumental for its forgery; and

(d) the respondent instructed PW2 to sign the metric plans for him but did not instruct her to sign on behalf of the appellants.

H In a well reasoned judgment, the learned trial judge had concluded in this manner:

> Furthermore, on the facts and circumstances of the instant case, the probabilities favoured the plaintiff's version, as it would be incredulous that the plaintiff, with a year still before the defendants could rescind the agreement and with the defendants' binding promise to execute the metric I plan, would knowingly risk, most unreasonably, where the only advantage or benefit was the saving, most ethereal, of the time that would be taken to secure the defendants' signatures, his complicity in a forgery that would expose him

not only to criminal prosecution but also the rescission of the said agreement, when there was no financial gain or advantage whatsoever. A

Reasonably, the third defendant, who admitted that there was no difference between the imperial and metric plans, would have appreciated that the metric plan, despite the absence of the defendants' signatures, did not give to the plaintiff an advantage that the defendants had not bargained for in the imperial plan. There being no advantage whatsoever to the plaintiff, then it B was the most unreasonable of the defendants to refuse, even if piqued that their signatures were forged and unhappy with the plaintiff's explanation, the execution of the fresh metric plan, as it was submitted to them for their signatures within the term allowed for the approval of the building plan and as it was not alleged that the plaintiff forged or was instrumental in the forgery of their signatures. Therefore, the defendants' assertion that the plaintiff had C not given them an explanation and that they were denied their right to the execution of the building plan was not supported by the facts. Rather, as contended by learned counsel for the plaintiff, it was more probable — with the third defendant's revelation of the existing buildings on the said land — that the defendants were engineering a way out of the said agreement, as the plaintiff's erection of the three shophouses would take up the existing road access and therefore put paid to Kwong Chin's development of the D defendants' land at the back of the said lot.

As for the other arguments that Mr Yu raised:

(a) the alleged illegality — the oral authorization to PW2 to sign the signatures of the defendants — did not emanate from the plaintiff,

(b) the oral testimony of PW2 and PW3 was admissible evidence, as it only E touched upon the performance of the said agreement and was not evidence contradicting varying adding to or subtracting from the terms of the documentary evidence — the said agreement and its terms — prohibited, and subject to the provisos, by s 92 of the Evidence Act,

(c) the amendment of para 11 — the plaintiff's admission of his knowledge that PW2 copied the signatures of the defendants — did not put the F defendants to a disadvantage,

(d) the plaintiff's instruction to PW2 to sign his signature was not the plaintiff's encouragement to PW2 to copy the defendants' signature(s), as the plaintiff's instruction was given after he was informed that the defendants had instructed PW2 to sign their signatures, and as he was informed that the defendants had so instructed PW2, there was no reason G for the plaintiff to inform the defendants that PW2 was copying their signatures,

(e) s 41 of the Contracts Act was inapplicable as the absence of the defendants' signatures on the metric plans was not brought about by the plaintiff's breach or default, nor by the plaintiff's action preventing the H defendants' execution; indeed, the false signatures of the defendants on the metric plan notwithstanding, the further performance of the said agreement could still be continued, if only for the defendants' execution of the fresh metric plan(s) that was not made impossible by the plaintiff.

Recapitulating the third defendant's testimony — 'I have never alleged that the plaintiff forged the landowner's signatures or was instrumental for its I forgery' — and for the grounds herein, the 'forgery' complained was not an act or deed of the plaintiff and not a breach of the said agreement. The plaintiff, who proved the said agreement and his due performance of the said

agreement, and that he had not refused to perform the said agreement or disabled himself from performing his promise in its entirety, was well within his rights to request for the execution of the fresh metric plan(s) — a replica of the imperial plan(s) agreed to before by the defendants. The 'grouse' of the defendants that the signatures on the metric plan(s) were not theirs, in the instant case, was not a good and valid defence to the action nor a sufficient basis for the counter-claim, as the plaintiff had not rejected disclaimed or renounced the said agreement.

We, too, have evaluated the evidence presented at the trial, carefully considered the arguments of learned counsel for both sides and the authorities cited by them. As an appellate tribunal, we would be reluctant to interfere with the findings of fact of the court below. However, in this case, we would venture to say that we totally agree with the reasoning and conclusion of the learned trial judge.

Accordingly, we dismissed the appeal with costs and ordered that the deposit is to go to the respondent to account of his taxed costs.

Appeal dismissed.

Reported by Jafisah Jaafar